

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN M. RUSSELL
Claimant

VS.

CITY OF WICHITA
Respondent
Self-Insured

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Docket No. 228,202

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on December 4, 1998, and the Award Nunc Pro Tunc dated December 7, 1998. The case is being considered without oral argument by agreement of the parties.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 20 percent disability based on functional impairment. He first found claimant would be entitled to a 54 percent work disability but also found respondent is entitled under K.S.A. 1996 Supp. 44-501(h) to offset amounts paid for a disability retirement. The offset exceeds the amount of the benefits but, under the statute, claimant is entitled to not less than the functional impairment.

On appeal, claimant argues that disability benefits are not subject to offset under K.S.A. 1996 Supp. 44-501(h). Claimant and respondent also both generally dispute the finding that claimant has a 54 percent work disability. Claimant contends it should be higher because the wage loss factor should be higher. Respondent contends that the award should be based on functional impairment and argues that the 20 percent awarded is too high.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board concludes the Award should be modified to an award for 54 percent work disability.

The Board adopts as its own the findings and conclusions by the ALJ relating to work disability. Specifically, the Board concludes claimant has a 60 percent task loss and a 47.25 percent wage loss. As a result, claimant has a 54 percent work disability. The Board so finds for the reasons stated by the ALJ in the Award.

But the Board also concludes the respondent is not entitled to an offset. Claimant is a 46-year-old who, because of the current injury, has been given disability benefits under the same plan addressed by the Board in *Green v. City of Wichita*, Docket No. 190,467 (August 1997). The Board there considered whether disability benefits should be offset under the provisions of K.S.A. 44-501(h). The relevant statutory provision provides an offset for retirement benefits other than benefits attributable to contributions by the employee. As in the *Green* case, the benefits at issue here are referred to by the employer as disability retirement benefits. The Board held in *Green* that the benefits contemplated by the statute, retirement benefits, are ones payable on the basis of age and/or seniority, not disability. For that reason, the Board held, and holds again here, the benefits should not be offset.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on December 4, 1998, and the Award Nunc Pro Tunc dated December 7, 1998, should be, and the same are hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John M. Russell, and against the respondent, City of Wichita, a qualified self-insured, for an accidental injury which occurred August 10, 1997, and based upon an average weekly wage of \$1,130.79, for 8.99 weeks of temporary total disability compensation at the rate of \$351 per week, or \$3,155.49, followed by 224.10 weeks at the rate of \$351 per week, or \$78,659.10, for a 54% permanent partial disability, making a total award of \$81,814.59.

As of March 19, 1999, there is due and owing claimant 8.99 weeks of temporary total disability compensation at the rate of \$351 per week, or \$3,155.49, followed by 74.72 weeks of permanent partial disability compensation at the rate of \$351 per week in the sum of \$26,226.72, for a total of \$29,382.21, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$52,432.38 is to be paid for 149.38 weeks at the rate of \$351 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director